is extended to August 27, 2002, and this response is timely filed. The Commissioner is hereby authorized to charge all fees in connection with this submission to Deposit Account No. 50-2350. A duplicate copy of this response is enclosed for such purposes.

In response to the Patent and Trademark Restriction Requirement of June 27, 2002, imposing a restriction requirement on the above-referenced application, Applicant provisionally elects the claims of Group I, Claims 1-6 and 17, and respectfully requests reconsideration and withdrawal of the restriction requirement between Groups I, II and III for the reasons discussed below.

REMARKS

In the Restriction Requirement of June 27, 2002, a restriction requirement was imposed between the following sets of claims: claims 1-6 and 17 (Group I) drawn to a promoter of the CD11d gene; claims 7-16 and 43 (Group II) drawn to a cis-acting element that influences the activity of a myeloid cell specific promoter; claims 18-31 and 43 (Group III) drawn to a construct comprising a cell specific CD11d promoter and heterologous gene and a cell expressing the gene; and claims 40 and 41 (Group IV) drawn to a method of expression for myeloid cell specific genes. Applicant respectfully traverses the restriction requirement imposed on the application by the Examiner.

In the Office Action, the Examiner asserted that the four inventions are unrelated. The Examiner stated that based on MPEP § 806.04 and MPEP § 808.01, inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different modes of operation, different functions, or different effects. The Examiner further asserted that in the instant case the different inventions have different effects because they each "are drawn to chemically and functionally distinct products and a distinct method."

However, the MPEP § 803 additionally states that if:

> If the search and examination of an entire application can be made without serious burden, the examiner **must** examine it on the merits, even though it includes claims to independent or distinct inventions. (emphasis added).

It is respectfully submitted that the inventions claimed in Groups I, II and III are closely related and the search and examination of Groups I, II and III together would not be a serious burden for the Examiner. The claims of Group I are directed toward the identification of a promoter of the CD11d gene which confers activity to genes placed into myeloid cells. The claims of Group II are directed to a cis-acting element within the promoter of Group I which influences the activity of the Group I promoter. Finally, the claims of Group III use the promoter sequences set forth in Groups I and II to assemble a construct for cell specific gene expression driven by the CD11d promoter. Each of the claims of Groups I, II and III require the presence of the CD11d promoter or a sequence related to the promoter.

A serious burden on the Examiner allowing for insistence upon restriction of related inventions as claimed may be *prima facie* demonstrated if the Examiner shows by appropriate explanation either separate classification, separate status in the art, or a different field of search for the different groups of claims. (*See*, MPEP §§ 803 and 808.02.)

With respect to classification of the claims of Groups I and II, the Examiner has classified the claims in both of these groups into the identical class (536) and subclass (24.1).

With respect to separate status in the art, the Restriction Requirement stated that "Group I is unrelated to Group II because each is a different product with different functions." However, both Group I and Group II relate to specific or general promoter sequences used to influence transcription of genes in myeliod cells. Indeed, Groups I and II are both drawn to CD11d promoter sequences, either as a general promoter or a specific cis-acting element. Therefore, the inventions of Groups I and II do not have a separate status in the art.

Regarding the field of search, although it is suggested in the Restriction Requirement that a different search is required for the claims of Group I and Group II, given that the claims in Groups I and II share the same classification and sub-classification, it is respectfully submitted that, in this case, it is not necessary to search for one of the distinct subjects in places where no pertinent art to the other subject exists. Since the claims of Groups I and II are classified in the exact same class and subclass, since no separate status in the art has been shown by the Examiner, and since it is not necessary to search for the subjects of the claims of Group I in places where no pertinent art to the subject of the claims of Groups II

exist, it is respectfully submitted that restriction between the claims of Groups I and II is not proper.

Although Group III is classified in a different class and subclass from Groups I and II, the claims are closely related, making the status in the art and the field of search analogous. Because the claims within Groups I, II and III contain similar structural features, the applicant respectfully contends that the search and examination of the claims of Groups I, II, and III should be possible without imposing a serious burden upon the Examiner. For example, all of the claims include the partial or full sequence of the CD11d promoter. Independent product claim 1 includes "all or a functional portion of isolated or recombinant SEQ ID NO:1...." As shown by the cis-acting element in claim 7 requiring a promoter "comprising a functional portion of isolated or recombinant SEQ ID NO:1..." and the construct in claim 18 requiring a "promoter comprising all or a functional portion of SEQ ID NO:1," all of the other independent claims also include the same feature set forth in claim 1.

In fact, each of the features of independent claim 1 is present in the other independent claims found in Groups I, II and III. For this reason, Applicant respectfully contends that any search directed to the product set forth in the claims of Group I will substantially overlap with a search directed to the products of Groups II and III. Applicant, therefore, respectfully maintains that the search and examination of Groups I, II and III may be made without seriously burdening the Examiner. Thus, it is submitted that the claims in Groups I, II and III are directed to a common invention that is appropriately examined in the same application, and Applicant respectfully requests that the Examiner reconsider and withdraw the restriction requirement between Groups I, II and III.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the claims of Groups I, II and III in the present application are closely related, and that the groups may be examined together without placing a serious burden on the Examiner, and that appropriate reasons for insisting upon restriction of the claims have not been properly established. Thus, it is

respectfully requested that the restriction requirement between Groups I, II and III be withdrawn and that claims 1-39 and 43 be examined together.

Respectfully Submitted,

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Date

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